

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CHARLES HOFFMAN,

Defendant-Appellant.

UNPUBLISHED

February 6, 2007

No. 266560

Jackson Circuit Court

LC No. 03-004026-FC

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based conviction of first-degree criminal sexual conduct (CSC I), the victim being under 13 years of age, MCL 750.520b(1)(a). Defendant was sentenced to a term of 18 years, nine months to 46 years, ten months in prison. We vacate defendant's conviction and sentence for the reason that defendant was erroneously denied his right to self-representation, and remand for further proceedings. This appeal is being decided without oral argument. MCR 7.214(E).

Defendant was originally charged with one count of CSC I, two counts of assault with intent to commit murder, MCL 750.83, and alternatively two counts of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant appeared for arraignment in district court, and in response to the court's inquiry, stated that he did not wish to have counsel appointed to represent him. Defendant stated that he was guilty, and that he wished to plead guilty and end the proceedings. The district court accepted defendant's waiver of his right to counsel and his right to a preliminary examination, and bound him over for trial.

Defendant appeared in circuit court for arraignment. The circuit court informed defendant that he was entitled to have counsel appointed to represent him, but defendant again indicated that he wished to proceed without counsel. The prosecutor indicated that defendant had agreed to plead guilty to CSC I and to one count of assault with intent to commit murder, and to be sentenced as a third habitual offender, MCL 769.11. After hearing the plea agreement, the circuit court again inquired if defendant wished to proceed without counsel, and defendant answered in the affirmative. However, when defendant refused to provide a factual basis for his plea, the circuit court refused to accept the plea and set the matter for trial.

Defendant appeared in circuit court for a pretrial hearing before the judge originally assigned to the case,¹ and was informed that because the court had determined that defendant's wish to represent himself was "not appropriate in view of the nature of the charges," counsel had been appointed.

Subsequently, defendant appeared in circuit court with counsel and agreed to plead no contest to CSC I and to be sentenced as a third habitual offender in exchange for dismissal of the remaining charges. The parties agreed that the sentencing guidelines were properly scored at 225 to 562 months. The circuit court relied on the police report as the basis for defendant's plea, accepted the plea, and sentenced defendant as a third habitual offender to 225 months (18 years, nine months) to 562 months (46 years, ten months) in prison.

Defendant, by appointed counsel, moved to withdraw his plea on the ground that the circuit court violated his right to self-representation. Defendant asserted that because his right to represent himself was violated, his plea was not voluntary or intelligent.

The circuit court denied defendant's motion. The circuit court distinguished a plea hearing from a trial, found that no structural error occurred, and concluded that allowing defendant to proceed without counsel in light of the seriousness of the charges he was facing "didn't make any sense." In addition, the circuit court agreed with the prosecutor that defendant should have filed an affidavit stating that he would not have entered into a plea had he not been represented by counsel.

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI,² and explicitly guaranteed by the Michigan Constitution and Michigan statutory law, Const 1963, art 1, § 13; MCL 763.1. Several requirements must be met before a defendant may represent himself. First, the defendant's request to represent himself must be unequivocal. *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). Second, the trial court must determine that the defendant's assertion of his right is knowing, intelligent, and voluntary. *Id.* Third, the trial court must determine that the defendant's self-representation will not disrupt, inconvenience, or burden the court. *Id.* In addition, the trial court must comply with MCR 6.005 by advising the defendant of the charge against him, the maximum possible prison sentence, any mandatory minimum sentence, and the risks of self-representation, and by offering defendant the opportunity to consult with an attorney. *Williams, supra* at 642-643. The failure to substantially comply with these requirements renders the defendant's waiver of counsel ineffective. See *People v Russell*, 471 Mich 182, 191-192; 684 NW2d 745 (2004).

¹ This judge had not presided over the circuit court arraignment.

² The right to self-representation under the United States Constitution derives from the Sixth Amendment right to counsel. The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005); see also *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). The Sixth Amendment right to counsel applies during all critical stages of the criminal process, *Willing, supra* at 219, including the pretrial period, *Maine v Moulton*, 474 US 159, 170; 106 S Ct 477; 88 L Ed 2d 481 (1985).

A trial court's finding whether the defendant's waiver of counsel was knowing and intelligent is reviewed for clear error, while the determination of the meaning of a knowing and intelligent waiver is reviewed de novo. *Williams, supra* at 640. The erroneous denial of the right of self-representation is a structural error requiring automatic reversal. *United States v Gonzales-Lopez*, ___ US ___; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000).

We vacate defendant's plea and sentence, and remand this case for further proceedings. Defendant unequivocally asserted his right to represent himself in both the district court and at his arraignment in circuit court. Those courts made inquiries that, while not searching, substantially complied with *Williams, supra*, and MCR 6.005. It was made clear that defendant wished to proceed without counsel and that he understood the fundamental consequences of this choice. Nevertheless, the circuit court simply appointed counsel for defendant on the ground that it believed self-representation was "not appropriate" under the circumstances.

Plaintiff concedes that the trial court erred in appointing counsel for defendant in the manner that it did. However, plaintiff argues that defendant is not entitled to relief because his plea was nevertheless voluntary. We disagree. When a defendant is denied the right to self-representation during the pretrial period, his resulting plea is necessarily involuntary because his only choices were to plead guilty or to proceed to trial with counsel that he did not want. See *United States v Hernandez*, 203 F3d 614, 626-627 (CA 9, 2000). Moreover, any inquiry into whether the resulting plea was voluntary is essentially an assertion that the underlying constitutional error was harmless. The refusal to allow a defendant to represent himself constitutes structural error, and is not amenable to a harmless error analysis. *Gonzales-Lopez, supra*; *McKaskle v Wiggins*, 465 US 168, 177-178 n 8; 104 S Ct 944; 79 L Ed 2d 122 (1984); *Duncan, supra* at 51-52. As our Supreme Court has noted, "[s]tructural errors . . . are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal." *Id.* at 51.

Plaintiff's assertion that defendant's no contest plea was much more favorable than the plea he negotiated without counsel is correct, and it is difficult to fathom how defendant could improve his situation by representing himself in further proceedings. Nevertheless, defendant is entitled to obtain relief based on the structural error that occurred in this case and to have his plea and sentence vacated.

Vacated and remanded. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper